No. 11,019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PERMANENTE METALS CORPORATION (a corporation),

Appellant,

vs.

B. PISTA and MARIE PISTA,

Appellees.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment at law of the United States District Court for the Northern District of California in favor of the plaintiffs, B. Pista and Marie Pista, against the defendant, The Permanente Metals Corporation, in the sum of $9903.84, plus costs of suit in the sum of $428.50.

The District Court for the Northern District of California has jurisdiction of the action under Section 24(1)(b) of the Judicial Code, as amended (28 U.S.C.A. 41(1)(b)), and Section 51 of the Judicial Code, as amended (28 U.S.C.A. 113).

The plaintiffs are citizens of California and the defendant is a Delaware corporation.

The amount in controversy, exclusive of interest and costs, exceeds the sum of $3000.00.

The pleadings necessary to show the jurisdiction of the District Court are the complaint (16 to 20), the answer (20 to 22), petition for removal of cause (7 to 10), bond for removal (11 to 14), and order for removal (4).

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction under Section 128(a) (d) of the Judicial Code, as amended. (28 U.S.C.A. 225(a)(d).)

The judgment of the District Court was entered on December 12, 1944 (34), on December 21, 1944, a notice of motion for new trial was made (34 to 37), motion for new trial and order amending findings made on January 2, 1945 (37 to 39), notice of appeal filed January 10, 1945 (39 to 40), transcript of the record on appeal was certified and filed by the Clerk of the District Court on March 22, 1945 (45) and filed in this court on March 29, 1945 (721).

STATEMENT OF THE CASE.

Appellant operates a calcining plant at Natividad, near Salinas, California, where dolomite ore, which is quarried nearby, is calcined. Appellees' apricot orchard is approximately a mile distant from the plant.

In 1943, during the blossoming or pollination period of the apricots, dust was discharged from the stacks of appellant's plant, some of which settled on appellees' orchard. Appellees claim this dust interfered with the pollination of the apricots, thereby causing a short crop. Appellant disputes this, contending that the appellees' short crop was caused by inclement and unfavorable weather.

The 1943 apricot crop, not only in Monterey County, but throughout the State of California, was the smallest in the history of the industry. That this widespread shortage was due to weather conditions and not to dust conditions is undisputed. The apricot yield in Monterey County was approximately 20% of normal, varying from a total failure to one orchard which had a 60% yield.

The court concluded that if it had not been for the dust, the appellees' yield would have equaled the highest yield in the county, namely, a yield of 60% of normal crop. Appellees' actual yield was approximately 10%. The court then calculated that the appellees' average yield for the five years preceding 1943 had been 266.16 tons per year, and that if there had been no dust, appellees would have had a crop equal to 60% of their average crop, that is, 60% of 266.16 tons or 159.69 tons. The court deducted appellees' actual yield of 26,221 tons from the computed yield of 159.69 tons, and said that the dust was responsible for the difference, or a loss of 133.75 tons. Appellees would have made a profit of $74.20 a ton, which on 133.75

tons would amount to $9903.84, for which amount the court gave judgment.

The court's judgment is therefore based upon the factual premise that if it had not been for the dust, the appellees would have had a crop equal to the highest yield in the county. If the evidence does not justify this premise the judgment should be reversed.

STATEMENT OF QUESTIONS INVOLVED.

Appellees produced four witnesses in an effort to prove that the dust from appellant's plant so seriously affected the pollination of the fruit in 1943 as to cause a shortage. Five major questions are presented on this appeal.

Question 1: Appellant objected to and claimed that the court erred in allowing a hypothetical question to be asked the expert witness, Mr. Twining, relative to the effect of dolomite dust on the production of apricots on the Pista orchard (Tr. pp. 169-70) and in permitting him to estimate the size of the crop if it had not been for the dust (Tr. pp. 172-3) on the ground that the hypothetical questions did not include any reference to the weather conditions, which admittedly were a material element in the problem.

Question 2: Appellant claims the court erred in permitting Mr. Pista, over the objection of appellant that he was not qualified as an expert on the effect of dust on pollination, to testify on the effect of the dust

on the apricot crop, and to testify as to the number of tons of apricots he would have harvested if it had not been for the dust. (Tr. pp. 64-65.)

Question 3: Appellant contends that no competent witness was produced by the appellees whose testimony gives the slightest evidentiary support to the court's conclusion that the dust was the proximate cause of any loss of crop for the reason that Mr. Lewis, a qualified expert, refused to express an opinion, and the testimony of the other three witnesses, namely, Mr. Twining, Mr. Pista and Mr. Anderson, is valueless, for the reason that all of them lacked the necessary qualifications, either by reason of lack of expert or factual knowledge, to render an opinion, with the result that their opinions were mere guess, surmise and conjecture and worthless as evidence.

Question 4: The court concluded that the appellees' crop shortage was the joint result of two causes, the dust and weather conditions. Appellant contends that when an injury results from two possible causes, and when the precise cause is, under the evidence, left to conjecture, and where the injury may be reasonably attributed to a condition for which no liability attaches as to one where a liability does attach, then judgment for the defendant should be given.

Question 5: The trial court attributed 50% of the short crop to dust, and 40% to weather. Appellant contends that such a division was the arbitrary act of the trial judge, and unsupported by any evidence, and was the result of guess, surmise and conjecture on the

part of the trial judge rather than a judicial determination based on substantial evidence.

Questions 1 and 2 were raised by appropriate objections to the testimony. Questions 1, 2, 3, 4 and 5 were raised at the conclusion of the evidence in argument to the trial court, on motion for a new trial (Tr. pp. 34-5), on statement of points on appeal before the District Court (Tr. pp. 41-43) and by statement of points on appeal before the Circuit Court of Appeals. (Tr. pp. 722-726.)

ARGUMENT.

DISCUSSION OF QUESTIONS 1, 2 AND 3.

Questions 1, 2 and 3 involve the probative value of the evidence together with objections to its admission. Appellant will therefore discuss these three questions as a unit.

CLOUDY, RAINY WEATHER DURING THE BLOSSOMING PERIOD CAUSED A SHORT CROP THROUGHOUT MONTEREY COUNTY.

It was recognized by the court in allocating 40% of the crop shortage to the weather, and it is indisputable, that cloudy, rainy weather was a material element entering into the causation of any crop shortage. No witness who was actually on the scene and personally observed the conditions denied or questioned this fact.

J. J. Wilmoth, whose orchard was located approximately one-half mile from Pista's but on whose orchard no dust fell, who had a 10% crop, stated:

"A. I think it was on account of the weather more than anything else that ruined my crop. My crop was in full bloom. * * * It commenced to rain. It rained about ten days. It turned out foggy and damp and rotted the blossoms." (Tr. p. 383.)

He further stated that in his opinion the short crop was due to the weather (Tr. pp. 383-4) and also that the Pista ranch which is nearby has about the same kind of weather. (Tr. p. 398.)

William D. Eiper, Secretary of the Aromas Local of the Prune and Apricot Growers Association and whose orchard had no dust on it, had approximately a 7% crop. He stated, when asked the cause of the short crop: "A. Well, I would say it was the rain. We had a long rainy period when they were in blossom" . . . and that in his opinion his short crop was caused purely by weather and climatic conditions existing during blossoming time. (Tr. pp. 401-2.)

Walter E. Packard, an expert called by appellant, commenced his study of the Pista crop shortage, the general statewide shortage, and Monterey County and the Natividad District shortage, in July, 1943, approximately four months after blossoming time. He visited all of the orchards in Monterey County, discussed with the owners of the orchards their 1943 crop, the amount of shortage and the causes thereof (Tr. p. 562); he discussed the same subject with the state and county agricultural officials in Monterey County (Tr. p. 563); secured reports of the yield throughout the state by

counties (Tr. p. 565), including Monterey County. He discussed the problem with all of the well known horticultural experts in California, including the professors at the University of California. (Tr. p. 567.) He studied the agricultural reports of Monterey County from 1938 through and including 1943. (Tr. p. 570.) He secured and studied the official weather and temperature reports from Monterey County. (Tr. pp. 577-583.) He examined personally all of the orchards in Monterey County, and out of a lifetime of study and experience devoted to horticultural pursuits, supplemented by the intensive investigation and study which has just been outlined, Mr. Packard was of the opinion that weather conditions caused the short crops in Monterey County. (Tr. pp. 576 and 583.)

Testimony of William Lewis.

William Lewis, who was called by the appellees, and not by the appellant, was the only witness who was actually on the scene during the blossoming period in 1943 and who, by reason of his training, experience, learning and power of observation, was competent to tell the court what actually happened. He was the District Agricultural Commissioner of Monterey County, and his testimony evidences the observations and conclusions of a painstaking scientific mind and must furnish the basis by which all other expert testimony must be judged and measured. We will therefore refer to his testimony at considerable length.

Mr. Lewis not only inspected the Pista orchard on several occasions but visited all the other orchards in

the county and was particularly familiar with the Bardin orchard, which he supervised. He described at considerable length how the weather conditions affected the apricot crops and also the behavior of the blossoms themselves. He stated that there were three different blooms in all the orchards in the district, which blooms extended over a period of about eighteen days; that the bloom itself was sufficient to give a crop but that he noticed that on the first bloom the cot, instead of growing from the bloom, would drop off and the same would happen with the second bloom, while with the third bloom that although the biggest portion dropped off, more set; that the blooms were not setting or developing into fertilized or pollinized cots. (Tr. pp. 96-7.) He made particular reference to the Bardin orchard, which had no dust on it, and compared the behavior of the blooms with the Pista orchard. He stated that the Bardin orchard had three cycles of budding and that the buds dropped off on the first cycle and most of the second, and that the behavior of the fruit was exactly the same on the Bardin and Pista ranches, also that the same phenomena of nature occurred on the Lester Sterling, Bob Sterling and the Anderson ranches. He stated that in his opinion the cause of these apricots dropping off was failure of the pollen to reach the pit. (Tr. pp. 110-111.) The same condition existed throughout the county and the reason why the pollen did not reach the pit was cloudy, rainy, chilly weather which stopped the pollinization, and this condition existed in all of the orchards in Monterey County. (Tr. pp. 111-112.) He described at

considerable length the conditions throughout the county. (Tr. pp. 112-114.) He stated definitely (Tr. p. 116) that throughout the whole district the cause of the fruit dropping off on the first and second cycles was caused by cloudy, cold, foggy weather (Tr. p. 116) but that the weather warmed up between the second and third blossoming. (Tr. p. 116.)

Lewis' testimony therefore conclusively establishes that every orchard in Menterey County, including Pista's had three cycles of blossoming, and all of the fruit which finally ripened set on the third cycle, and that the dropping of the fruit resulted from the same cause, namely, the weather. Pista's orchard did not differ from the balance of the orchards but followed the same pattern. The identical behavior of all of the orchards in Monterey County in having three cycles of blossoming with the small cots dropping off on the first two cycles and with the crop setting on the third cycle, supplemented by Lewis' testimony relative to the uniform bad weather and its effect on pollinization, supplemented by his own opinion, unerringly and indisputably point to the fact that the same cause was responsible for the identity of behavior of all of these orchards, and that this cause was unfavorable weather. If the dust had affected the production of the Pista orchard and had not affected the other orchards, it is certain that this skilled observer would have noted some different behavior on the part of the blossoms on the Pista orchard from that which existed in the balance and would have pointed it out in his testimony, which he did not do, but not only did he not do so but

he refused to express the opinion that Pista's crop shortage was caused by the dust. (Tr. p. 97.) He was asked what, in his opinion, was preventing the apricot blossoms from setting on the Pista ranch. His answer was "That area had me puzzled." Again he was questioned as to whether the Permanente dust did or did not interfere with the setting of the fruit on the Pista orchard and he replied that something interfered with it. (Tr. p. 99.) Finally Lewis was recalled to the witness stand at the close of the case and he was asked the direct question as to whether or not he believed that the Permanente dust hurt the Anderson and Pista apricots, to which he replied "I am not going to state that the dust did that or did not." (Tr. p. 719.) This refusal by appellees' own witness to testify that in his opinion Pista's short crop was caused or was attributable to dust is tantamount to a declaration on his part that—in his opinion—the dust had nothing whatsoever to do with the short crop in 1943, with the result that Lewis' testimony cannot be relied on to support the court's judgment. Since it must be conceded that the weather was at least one of the controlling causes of the short crop, any expert who attempted to give his opinion and did not take recognition of the effect of the weather would be engaging in mere surmise, guess and conjecture, and his opinion would be valueless as evidence. The other three witnesses produced by the appellees, namely, Twining, Pista and Anderson, fall in this category, because none of them gave the slightest recognition of the weather conditions.

Testimony of F. E. Twining.

After Mr. Lewis, appellees called F. E. Twining, a qualified expert. Not only did Mr. Twining have no knowledge of the weather or actual conditions existing at the time of the crop failure, but in addition his entire conclusions were based upon laboratory experiments and calculations made more than a year after the crop failure and which were mere guesses, surmises and conjectures as to what actually occurred during the pollination period in 1943.

Mr. Twining first visited the orchard in March, 1944. This first visit was approximately one year after the 1943 blossoming period. Following this visit he rendered, on March 31, 1944, a report. (Pltfs'. Exhibit 4.) Pages 3 and 4 of Plaintiffs' Exhibit 4 contain an analysis of the dust on vegetation gathered on the March, 1944, visit. (Tr. pp. 146-149.)

He subsequently made two additional visits to the orchard, one on June 22, 1944 (Tr. p. 137), and another on August 1, 1944. (Tr. p. 137.) After these last two visits he rendered a supplemental report dated August 8th. (Pltfs'. Exhibit 5, Tr. pp. 153-156.) Page 3 of Exhibit 5 contains an analysis of the dolomite ore taken at the quarry, page 4 contains a chemical analysis of the dust on the apricots and leaves gathered on the June 22nd visit, and page 5 contains an analysis of the dust on the leaves and apricots gathered on the August 1st visit.

He then testified as to calcine material:

> "it affects the secretion of the stigma and prevents the pollinization or fertilization. That occurs during blossoming time and, of course, depends on *the quantity* as to how much damage it might do." (Italics ours.)

Since according to Twining a definite and accurate knowledge of the *quantity* of such deposit is a prerequisite to and must form the basis of any sound opinion, therefore any witness must necessarily be possessed of accurate knowledge of the following factual essentials in order to render an opinion as to the effect of the calcine material on the crop, namely, (a) the date and time period of blossoming, and (b) the rate of deposit during this period. These two factual essentials cannot be supplied by guess, surmise or conjecture, and if they are, then the witness' expression of opinion is worthless because the factual premise for the opinion is nonexistent.

Twining never pretended to have any knowledge as to when the blossoming period occurred on the Pista orchard, how long it lasted, or the quantity of dust deposited. His approach to the problem was purely hypothetical and not factual and as far as he was concerned the blossoming could have occurred at any time and it would have made no difference in his calculations and the result would have been the same. By a laboratory experiment he sought to determine the total amount of dust deposited during the entire

year of 1943,* and then guessed, surmised and conjectured that the rate of deposit never varied from day to day but was constant throughout the year. That is, he guessed that the deposit of dust on the Pista orchard was constant throughout the year without any knowledge whatsoever of the actual conditions or whether the dust deposit may have been far greater at one time than at another.

Twining, in May of 1944, took three samples of evergreen foliage, two of which were oak leaves and one of which was citrus (Tr. pp. 163-4), which leaves would have on them the dust deposit from the commencement of the operation of the plant. He also took a new growth of weeds, which would have on them only the dust which had been deposited since the weeds had sprouted in the spring of 1944. He then deducted the deposit on the weeds, that is, the 1944 deposit of dust, from the deposit on the evergreens, which he had erroneously concluded represented the 1943-44 deposit and then assumed that the difference in deposit represented the 1943 deposit. (Tr. pp. 164-6.) This calculation was the sole extent of Twining's knowledge as to the quantity of dust deposited during the 1943 blossoming period. That he was devoid of actual knowledge of the amount deposited during this period and was indulging in the wildest type of guessing is easy to demonstrate.

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*As we will subsequently show, this experiment and the calculations based thereon abound in error and in unsound assumptions of fact.

Mr. Lewis, by skilled personal observation, fixes the commencement of the blossoming period in 1943 on the Bardin orchard as commencing in the first week in March, with the Pista orchard coming into blossom about five days later (Tr. p. 61) and lasting for approximately 18 days. (Tr. p. 48.) Mr. Packard, a witness for appellant, who made an exhaustive factual and scientific investigation as to the causes of the 1943 crop failure, agreed with Lewis. Lewis did not attempt to fix the particular day during the first week in March that the blossoming commenced on the Bardin orchard, merely testifying that it was during the first week of March. Therefore, the blossoming commenced on the Pista orchard somewhere in the neighborhood of the 10th of March, and continued for 18 days, or until approximately March 28th.* If there was any interference with the pollination by reason of dust, it had to be in the period somewhere between the 6th of March and the 1st of April, or a period of 25 days, and since, according to Twining, the amount of damage the dust might do "depends on the *quantity*" (Tr. p. 160), a knowledge of the amount of dust deposited during this 25 day period is a prerequisite to the formation of any opinion whatsoever, either sound or unsound, and a lack of such knowledge converts any estimate as to the amount of damage resulting from

*These dates cannot be accurate, but the variation of a few days is unimportant because it is certain that the blossoming covered a period of approximately 18 days in the middle of the month of March.

interference with pollination into valueless conjecture. Twining did not pretend to have any such knowledge.

Furthermore, his assumption that the difference in deposits on the evergreens and the young weeds represented the dust which had accumulated through 1943, or that there was no variation in the rate of accumulation is not supported by any information or knowledge possessed by Twining, but is contrary to the facts.

Appellant's plan commenced operations in 1942 and the dust deposit commenced at the same time, because Lewis testified that he first observed the dust deposit on the Pista orchard in September of 1942. (Tr. pp. 42-43.) Therefore, the deposit on the evergreens did not commence in 1943 as assumed by Twining, but in 1942, which would make the rate of deposit for any given period 20 to 25 per cent less than Twining's calculations.

Knowledge of the rate of deposit during this 25 day pollination period is essential to even a guess. Twining did not indicate that he even knew if the plant was operating during this 25 day period. For all he knew, it might have been shut down during this period or during a portion of it, or only one of the two kilns might have been operating. It might have been operating 24 hours a day, or only a portion of the day. Certainly the direction and velocity of the wind during this period would affect the quantity of dust deposited. It might have been blowing away from the Pista orchard instead of toward it. Wet or clear weather might materially change the rate of deposit

from time to time. Twining did not evince any knowledge of any of these subjects, nor did he even pretend to have the slightest knowledge of the *quantity* of dust deposited during the 25 day period. All which he did was—a year after the crop failure he measured the dust deposit on two sets of leaves, and then guessed that the difference in the two deposits had been deposited during the year 1943, when in fact the deposit covered at least fifteen months. He then guessed that the rate of deposit was constant throughout 1943, without having any knowledge or actual observation to support such guess.

Twining was then asked the following hypothetical question:

> "Q. Assuming, Mr. Twining, the deposit of the dolomite material in 1943 to the extent that your examination and analyses of the 1943 samples disclosed, and assuming that those samples came from the Pista orchard of 44 acres, or something like 3000 trees or over, and assuming that in the year 1943 that orchard and those trees produced no more than 27 tons of apricots, what in your opinion or estimate would the tonnage have been if that dolomitic deposit had not fallen upon the trees?" (Tr. p. 169.)

This question was objected to on the ground that it was incompetent, irrelevant and immaterial; that the witness had not qualified as an expert on horticulture; and that the hypothetical question did not embrace all the facts as disclosed by Mr. Lewis, as to what actually happened in that year; *and that it contained no*

reference "to the cold and foggy weather and the three cycles of blossoming". The objection was overruled.

It will be noted that Mr. Lewis had already testified that the weather played a part in the loss of yield, and yet no reference is made to this material element. Furthermore, the question is contrary to the evidence because there were no 1943 samples analyzed, but the only samples which were analyzed were those on the evergreens which contained the deposits from September, 1942, to March, 1944.

The witness answered:

> "There was definite damage due to the deposits. *Now, in order to arrive at how much damage occurred, I either would have had to have examined that orchard through the season,* or, taking into consideration general conditions, 1943 was what we call a low-crop year, *and average it up.* For instance, the average in our particular territory would run from 35 to 50 per cent of a crop. Under those circumstances, why, of course 27 tons was practically nothing. * * *
>
> Mr. Moore. I want to make a motion to strike the answer out, your Honor, on the same grounds I voiced in the original objection. (111)
>
> The Court. I will allow the record to stand. Let your objection be noted, and the answer stands subject to your motion to strike."

Twining's answer discloses, and he definitely states, that he had no knowledge of what occurred in 1943, but merely averaged the crop on the basis that it was a low-crop year, which in his particular territory ran

from 35 to 50 per cent of a crop. Mr. Twining's residence was in Fresno County and not in Monterey County. The short crop in Monterey County was approximately 20 per cent of the average crop and not 35 per cent or 50 per cent.

Mr. Twining was then asked:

> "Q. Can you from the question I put to you indicate to me an opinion or estimate, say, in the form of how many times 27 tons might have been expected if there had been no dust?
>
> Mr. Moore. I am going to voice the same objection and add to it this man is not qualified, is not a horticulturist, and how in the world can anybody even make a guess, your Honor?
>
> The Court. *I do not know,* but I will have a record and you will have a record to comfort yourself with. I will allow it to go in under the same ruling." (Tr. p. 172.) (Italics added.)

Twining then guessed that the crop, if it had not been for the dust, would have been 7, 8, or 9 times 27 tons. (Tr. p. 173.) He was then asked as to his reasons:

> "Q. State the reason or reasons for your estimate of 7, 8 or 9 times 27 tons.
>
> A. *Well, I am basing that simply on general* (112) conditions that I knew occurred; that is all."

Just what Mr. Twining meant by "knowledge of general conditions" was not explained. He certainly had not displayed any knowledge as to the amount of dolomite dust deposited during the blossoming period in 1943, and he was not interrogated, and he did not

testify as to any knowledge as to weather conditions, but was permitted to give his expert opinion when by proper objection attention was drawn to the fact that the question ignored all reference to the weather.

Twining's cross-examination shows that Twining was indulging in the wildest type of guessing and conjecture, because he knew absolutely nothing about what had occurred in the blossoming time in 1943.

"Q. But it is your opinion that it did affect it in '43, is that true?

A. Well, in taking the total amount of material and figuring that that was deposited in '43, I know that that material will cause some damage. Now, I didn't check up on the bloom or the dropping of fruit, so I can just give it as an opinion.

Q. In other words, you are calculating from the result to the cause rather than from the cause to the result, is that right?

A. I am calculating from the cause, yes.

Q. Now, might it not be possible that in 1943 that a short crop was due to other elements or factors rather than the dust from this——

A. Well, taking into the case this particular case—taking into consideration and knowing there was a short crop, I still think it was shorter than it should have been.

Q. But you never saw the trees; you don't know anything about it?

A. Not at that time." (Tr. p. 216.)

He did know that Pista had a short crop in 1943, but he admits that there might be many things which entered into causing the short crop other than dust.

"Mr. Moore. Q. Mr. Twining, let me ask you, you say that in your opinion if it had not been for this deposit of dust in 1943 that the yield of the Pista orchard would be seven, eight or nine times greater than it was; am I making a correct statement of your testimony?

A. *No, I do not want it as a direct statement.* If it had not been for this dust, I give it as an opinion that this dust affected it, and taking some other things into consideration, he should have had a crop of, I would say, eight times what he did.

Mr. Moore. Will you read the last part of that answer?

(Record read.)

The Witness. I would not specify exactly what he should have had, but I am just stating what he should have had under varying conditions.

Mr. Moore. Q. What other things did you take into consideration?

A. Well, the general conditions during the year, and assuming the climatic conditions, the cultivation and so on, were properly handled.

Q. I don't understand you—the climatic conditions were properly handled.

A. Well, not being there, you might have had a snowstorm in the first of April, or a heavy frost, or something of that sort. I practically know that he did not, but I say those things might happen." (Tr. pp. 217-218.)

It will be noted that although Twining referred to climatic conditions, nevertheless, he testified that he never examined the weather reports of Monterey County or of the Natividad district and did not know

what the weather conditions were in the Natividad district in 1943. (Tr. p. 219.) He also admitted that he never had occasion to study the cause of the short crop throughout California in 1943.

> "Q. You made no investigation or study of any kind, character or description relative to the effect of a particular weather, climatic conditions that occurred in 1943, so far as it affected the apricot crop, is that correct?
>
> A. That is pretty general. I might say 'No' to that question, because I made no specific examinations based on that." (Tr. p. 221.)

It will thus be observed that Twining admitted that there was a short apricot crop in California in 1943 and that this shortage was due to inclement weather, but that he made absolutely no investigation as to the effect of the weather on the apricot crop. Admitting that there was a short crop caused by weather, the result is—that Twining's statement that Pista would have had seven, eight or nine times the crop which he had, if it had not been for dust, is pure surmise and conjecture, and does not rise to the dignity of evidence.

Testimony of Pista and Anderson.

The fundamental basis which determines the admissibility of all opinion evidence is that the expert is possessed of special skill or science on a subject on which the court or jury is supposed to have little or no knowledge, and that therefore the expert opinion adds to the knowledge of the tribunal as to the facts, and assists that tribunal in reaching a sound conclusion.

The fundamental question involved in the present litigation is: Did the dust which was deposited on the Pista orchard interfere with the pollination of the crop to such an extent that it caused or contributed to cause the short crop in 1943? This issue is a highly technical and scientific one. The evidence of Mr. Twining, Mr. Pista and Dr. Duschak is all to the same effect, namely, that the discharge is a combination of magnesium oxides and calcium oxide at the time it leaves the kilns and is highly caustic, and that as it passes through the air it picks up moisture and becomes a hydroxide, and subsequently picks up other elements and reconverts itself into calcium carbonate, which is not caustic and probably not injurious. These three qualified experts testified at great length as to the effect of oxides, hydroxides and carbonates on the pollination of fruit. In order that the testimony of Pista and Anderson would have any value whatsoever, it was necessary to establish first that these particular witnesses were possessed of some special skill or science as the result of which he possessed superior knowledge relative to the effect of this dust on pollination. In the absence of such knowledge his testimony would be of no value, and before he was permitted to testify he should have been qualified as an expert by showing that he was possessed of some knowledge beyond that ordinarily possessed by the average juror or judge. Otherwise his testimony would fall within the evidentiary rule prohibiting a witness from giving his opinion or conclusions, it being the primary function of the court or jury to draw the necessary conclusions from the proper recitation of the facts.

Pista and Anderson were orchardists and there is no pretense that either of them had the slightest knowledge on this highly scientific and technical subject, nor is it claimed that either of them through practical experience by reason of contact with situations where similar dust was deposited, had gained any knowledge or that they had any knowledge or experience of the effect of oxides, hydroxides and carbonates on pollination. Peculiarly, neither of them had any knowledge of the weather which occurred during the blossoming period of 1943. They both displayed ignorance of this vital subject. Pista could not even write. He was so illiterate and ignorant he could hardly understand the English language. The court allowed leading questions to be propounded to Pista by his own counsel because of his inability to understand a simple question. (Tr. p. 61.) "You will have to lead him somewhat, going step by step." His own counsel admitted (Tr. p. 63) he would have difficulty pursuing "with this witness" the difference between budding and blossoming, "I will pursue it with other witnesses." The court warned opposing counsel not to use the word "solitary". "He has some difficulty to understand it." Mr. Naus said "I doubt of he knows what 'solitary' means". (Tr. p. 68.) His ignorance was again displayed when asked on cross-examination if the rain had anything to do with his short crop and he replied "I don't know, it's in the book (the account book). I don't write, you know". It thus appears that when he was asked a simple question as to the effect of the rain on his crop he not only couldn't give an answer to the question

but couldn't even understand it. He knew that in 1943 there was some rain and admitted it did rain some while the fruit was in blossom but the rain was "not so heavy," but apparently he did not know when the blossoming started but guessed it was around the first of February and stated "Maybe you know. I don't know. (Tr. p. 73.) It must be remembered that Pista did not live on the ranch but lived at Watsonville. (Tr. p. 55.) It thus appears that he was in error by a month as to when the blossoming commenced, Lewis' testimony showing it to be somewhere in the middle of March and the other witnesses corroborating Lewis' testimony. This illiterate man, who could not write, could not understand simple English words, who was in error in regard to when the blossoming period commenced, and had little or no knowledge of the rainfall, was permitted by the trial court, over proper objection, to testify on a highly scientific and technical subject, namely, the effect of dolomite dust on the pollination of fruit, as follows:

> "Q. If no dust had come over from that Permanente plant in the year 1943, Mr. Pista, what, from your experience and from what you saw about the trees that year, would have been the number of tons you could have harvested from the trees." (Tr. p. 64.)

To which the following objection was made:

> "Mr. Moore. I am going to object to that, your Honor. That question is highly objectionable, argumentative, and assuming facts that are not in evidence. How he could tell as an expert whether the cement dust caused a short crop or not, I do

not know. He is not qualified as an expert in any way, shape, or form."

In the course of the argument the attorneys for the appellant further stated:

"Asking this man whether he had a short crop because of that cement dust I take it your Honor, is going far beyond his capacity. He cannot testify."

Nevertheless, the court ruled "I will allow the question. It goes to the weight of the answer".

The question was reframed as follows:

"Mr. Naus. Mr. Pista, in 1943 you testified that you were down at the orchard two or three times a week, that you saw the orchard, you saw the condition; now, if no dust had come on your orchard, what do you estimate is the number of tons of apricots you should have harvested in 1943." (Tr. p. 66.)

"Mr. Moore. So the record will show it, your Honor has already ruled, the question has been restated, and I will object to it as incompetent, irrelevant, and immaterial, assuming facts not in evidence. This man is not qualified to testify along that line.

The Court. The objection is overruled.

Mr. Moore. Note an exception.

Mr. Naus. Q. Can you answer?

A. If there was no dust from cement my figure would be from 200 to 250 tons.

Q. From 200 to 250 tons?

A. Yes." (Tr. p. 66.)

Anderson's orchard was located much closer to the appellant's plant than was Pista's. His ignorance was abysmal and his lack of knowledge or memory as to what happened in 1943 is startling. He could not remember whether they had rain or whether there was fog. All he knew was that the cots just formed and dropped off. (Tr. p. 545.) Amazingly, he testified that he knew nothing about what happened to the other orchards in Monterey County, including his near neighbors—Pista, the two Sterlings, the Hill. Still more amazing, he didn't even know that there was a short crop in Monterey County. He believed that there was some report that they had a short crop in the state of California but he wasn't sure. He never made any inquiries of his neighbors or state agricultural officials as to the cause of the short crop. (Tr. p. 546.) He never discussed with anyone whether there was a short or long crop in Monterey County, or whether the same phenomena of nature occurred in other orchards. (Tr. pp. 546-7.) He did believe that possibly the weather may have had something to do with the short crop but he had no recollection as to the weather. (Tr. p. 548.) He did not know what chemicals dolomite dust was composed of. (Tr. p. 549.) He did not even know the near neighbors, the Bardins, had lost the first setting. (Tr. p. 553.) He never discussed the 1943 short crops with anyone. (Tr. pp. 544-5.) He testified that in his opinion the dust caused his short crop. (Tr. p. 535.) He claimed he never talked with the attorney who placed him on the witness stand what he would testify to (Tr. p. 555) but he admitted

that he had consulted them relative to suing Permanente. (Tr. p. 547.) An unbelievable situation. He did not testify or render any opinion as to what was the cause of Pista's short crop, and could not do so because he did not even know that he had a short crop.

This type of testimony does not reach the dignity of evidence or even naked opinion based on speculation and conjecture, but is merely an opinion based on an intent to sue the same defendant.

THE LAW RELATIVE TO TWINING'S TESTIMONY.

Ordinarily a witness is not permitted to express his opinion or conclusion with respect to matters in issue, but one of the exceptions to this rule is embodied in Section 1870, Subdivision 9 of the Code of Civil Procedure of the State of California, which permits opinion evidence as to "a question of science, art, or trade, when he is skilled therein". Therefore, before any testimony as to the effect of dust on the pollination of fruit is admissible or before it has any value, it must be shown that the witness was skilled on this subject. This type of testimony may be elicited through the medium of hypothetical questions or by the opinions of skilled persons based on personal observations. The rule is incontrovertibly established that an expert's opinion is simply a guess and therefore worthless as evidence which ignores important or controlling basic factual elements entering into the problem, and that where it appears that such basic

factual elements are not included in the hypothetical question the objection to such question should be sustained.

The rule is of general application. 11 R. C. L., page 50, reads:

> "The trial court should exclude it if it (the question) selects or presents the facts unfairly or omits essential facts which are admitted or rendered practically certain by the evidence."

That such an opinion is the mere guess and conjecture of the witness is established by 20 Am. Jur., page 667:

> "It is necessary, however, that the facts upon which the expert bases his opinion or conclusion permit reasonably accurate conclusions as distinguished from mere guess or conjecture."

Corpus Juris states, relative to hypothetical questions:

> "Undisputed facts, when material, must always be assumed, even though some of such facts are detrimental to proponents' case."
>
> 22 *C. J.* 711;
>
> 32 *C. J. S.* 353-4.

California courts recognize this doctrine. In *Lawrence v. Butler,* 79 Cal. App. 436, where an objection was sustained, the facts appeared in the court's opinion.

> "It will be noted that the very element which was shown by the testimony of all witnesses to the accident, including that of a traffic officer, to have

been the sole contributing cause of the backward movement of the truck, namely, the greasy condition of the pavement, was wholly omitted from both questions. If, therefore, appellant was seeking to prove that the accident could have been averted by the proper application of effective brakes, the substance of the questions asked was foreign to the situation described by the undisputed evidence in the case."

In the *Estate of Clark,* 100 Cal. App. 357, the case was reversed because of error in allowing a hypothetical question. The court stated:

"This objection is unanswerable. These witnesses based their answer upon a statement of facts which, besides being directly contrary to the facts proved, omitted many essential elements in the history of the testator's life which were then before the jury and conceded to be true. For the purpose of this opinion it is necessary to refer to but a few of these discrepancies. * * * It is unnecessary to further detail discrepancies in this hypothetical question. *Manifestly the answers of the three experts must have had some effect on the minds of the jury and because of the error in this respect, if for no other reason, the judgment must be reversed.* (Estate of Gould, 188 Cal. 353 (205 Pac. 457); Snow v. Harris, 41 Cal. App. 34, 37 (181 Pac. 676); Treadwell v. Nickel, 194 Cal. 243, 264 (228 Pac. 25); Johnson v. Clarke, 98 Cal. App. 358 (276 Pac. 1052).)" (Italics ours.)

In *Jensen v. Findley,* 17 Cal. App. (2d) 536, the court said:

> "The hypothetical question propounded to Dr. Marsden did not set forth and include all of the treatment administered by defendant, and the objection made to it should have been sustained. * * * With plaintiff admitting that defendant placed some drug in his eye during each treatment, and his expert believing that nitrate of silver was the best specific for the disease, *the answer of the expert to the hypothetical question was of no value as the drug used was not named in the question asked and that part of the treatment administered by defendant was not referred to in it.*" (Italics ours.)

The case of *McCullough v. Langer,* 23 Cal. App. (2d) 510, is cumulative on the point that the hypothetical question must include the essential factors. On page 521, the court states:

> "With respect to the challenged ruling upon the question asked of Dr. Dickinson it was purely hypothetical in its character. It failed to include many essential factors of the issues involved in the case at bar. As a hypothetical question it was clearly defective. An answer to that question would throw no light on the issues in the present case."

In *Thoreau v. Ind. Acc. Com.,* 120 Cal. App. 67, where the opinion of a doctor was based on a false assumption, the court said that the conclusion of an expert based upon an improper hypothetical case is of no practical value. Other California cases to the same effect are: *Reese v. Smith,* 9 Cal. (2d) 324; *Citron v. Fields,* 30 Cal. App. (2d) 51; *Bickford v. Lawson,* 27 Cal. App. (2d) 416.

The federal decisions are in accord with the general rule.

In *Western Assur. Co. of Toronto v. J. H. Mohlman Co.,* 83 Fed. 811, a hypothetical question was asked as to how long a fire in a building would burn before the posts would be weakened and what time would elapse before fire and smoke would appear. The Circuit Court of Appeals said that the question was properly rejected because it gave no indication as to the whereabouts in the building the fire broke out and was therefore "mere wild guesswork".

In *Atlantic Life Ins. Co. v. Vaughn,* 71 Fed. (2d) 394, the court pointed out that the opinion of a physician given on direct examination would have supported the verdict, but the cross-examination had so destroyed the value of his original opinion through showing that opinion was based upon an assumption of fact rather than upon an actual fact that it was worthless, and held it would not support the verdict and for this reason reversed the decision of the lower court.

Furthermore, it is stated in 32 C. J. S. at page 220, that a witness, no matter how skilled, will not be permitted to guess or state a judgment based on conjecture, that is, the factual foundation must not be nebulous.

Twining was undoubtedly a skilled person, but had no personal knowledge of what occurred at the blossoming time, and therefore had to be interrogated through the medium of hypothetical questions. We believe it is useless for appellees to contend that Twin-

ing's erroneous laboratory experiments and calculations can be substituted for any personal observation, with the result that the only proper method by which he could be interrogated was through the medium of hypothetical questions. Regardless, however, of his laboratory experiments his lack of knowledge of the cause of the general crop shortage and the effect of the inclement weather in Monterey County strips his testimony of all probative value.

LAW RELATIVE TO PISTA'S AND ANDERSON'S TESTIMONY.

The rule in California is stated in *Johnson v. Western Air Express Corp.*, 45 Cal. App. (2d) 614 at 630.

> "True, Mrs. Johnson was an experienced pilot, and as appellants contend may have been qualified as an expert, but she was not such in the operation of planes of the type and design of the one involved in the accident here in question. Therefore the question of whether she was qualified to give her opinion as evidence in the matter in issue was one for the decision of the trial judge in the first instance, and the qualifications of the witness are to be determined by the trial court before such opinion may be given. (*Fairbank v. Hughson*, 58 Cal. 314.) It is in itself in the nature of a trial of a question of fact by evidence addressed to the judge alone, and as on other decisions on questions of fact by a trial judge, his ruling thereon is a matter of discretion and will not be overturned on appeal unless there was an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence

> given on the subject. (*Howland v. Oakland etc. Co.,* 110 Cal. 513, 521 [42 Pac. 983]; *Mabry v. Randolph,* 7 Cal. App. 421, 427 [94 Pac. 403].) If there is any substantial evidence to support the ruling of the trial court, it will be upheld."

Appellant submits that under the foregoing rule there is no substantial evidence to support the ruling of the trial court, but that there is an actual want of evidence that either Pista or Anderson were skilled or possessed of any skill or knowledge relative to the effect of dust on pollination. In *Reynolds v. Jordan,* 6 Cal. 108, the syllabus reads: "The opinions of a person not an expert, are not evidence." Likewise in *Rassaert v. Mensch,* 17 Cal. App. 637, the syllabus reads: "No mere opinion evidence of an ordinary witness is admissible." *Largan v. Central R. R. Co.,* 40 Cal. 272, holds that the evidence which is purely a matter of opinion and not the statement of a fact should be excluded. In *Clinton v. Yates,* 88 Cal. App. 281, the court held the conclusions of witnesses were improper and that objections thereto were properly sustained. In *Barnett v. Atchison etc. Ry. Co.,* 99 Cal. App. 310, the court said:

> "There had been no attempt to prove that the engineer was an expert upon the facts concerning which he was interrogated and there was no attempt to incorporate in the question the facts and circumstances upon which the witness was asked to express an opinion."

In many instances the courts have held that a lay witness cannot testify upon a subject which calls for

expert knowledge. In *Hoyt v. The Long Island R. R. Co.,* 57 N. Y. 678, a newspaper reporter who had visited many railroad accidents over a period of years was not permitted to testify as to the cause of a broken rail. Where a building collapsed, a brick mason was called as a witness, but in *Peteler etc. Co. v. Northwestern etc. Co.,* 61 N. W. 1024, it was held that he was not qualified because the matter upon which he was interrogated required the knowledge of other materials which were in the building. In *Duntley v. Inman, Poulsen & Co.,* 70 Pac. 526, 59 L. R. A. 785, Judge Bean held that a millwright with no experience in the manufacture of such articles cannot give his opinion as to what caused a pulley to break. In *Epstein v. Interurban Rapid Transit Co.,* 101 N. Y. Supp. 793, the court held an expert plumber was not qualified to give an expert opinion as to whether the sinking of an iron pillar was the cause of the breaking of a drain-pipe. In *Aetna Life Ins. Co. v. Kelley,* 70 Fed. (2d) 789, where the question was whether the insured died as a result of injuries or as a result of arteriosclerosis, the court held the existence of this specific disease was a strictly medical question and that the conclusions of a layman upon such an issue are without adequate basis and necessarily mere speculation.

With respect to Pista and Anderson, we submit that their testimony is devoid of any evidentiary value for the reason that there is not the slightest pretense that either of them had any knowledge whatsoever of the highly technical subject of the effect of dolomite dust on blossoming.

DISCUSSION OF QUESTION 4.

The law is settled that where injuries are alleged to have been caused by the defendant's negligence, and it appears that the injuries were occasioned by one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff must fail if the evidence does not show that the injury was the result of the former cause. If the testimony shows it was just as probable that it was caused by one as the other he cannot recover. In the case of *White v. Spreckels,* 10 Cal. App. 287, where a radiator exploded, the court said: "The cause of the explosion is a matter of conjecture from evidence in this record." In the *White* case the court said:

> "The true rule, in our opinion, is laid down in *Searles v. Manhattan R. Co.,* 101 N. Y. 661 (5 N. E. 66), as follows: 'Where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which defendant is responsible but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause. If under the testimony it was just as probable that it was caused by the one as the other, he cannot recover.'
>
> In *Ryan v. Fall River Iron Works,* 200 Mass. 888 (86 N. E. 310), the supreme court of Massachusetts said: 'The occurrence of an accident standing alone is not always evidence of negligence. It may be as consistent with the innocence as with the fault of the person controlling the agency by which the accident happened. When the precise cause is left to conjecture, and may be as

reasonably attributed to a condition for which no liability attaches as to one to which it does, then a verdict should be directed against the plaintiff.'

To the same effect see note to *Mitchell v. Chicago & A. Ry. Co.,* 132 Mo. App. 143 (112 S. W. 291); *Warner v. Railway Co.,* 178 Mo. 125 (77 S. W. 67); *McGrath v. St. Louis Transit Co.,* 197 Mo. 97 (94 S. W. 872); *Robinson v. Empire City Subway Co.,* 53 Misc. Rep. 593 (103 N. Y. Supp. 717); *Strasburger v. Vogle,* 103 Md. 85 (63 Atl. 202).

As we have before said, the evidence does not clearly show that the accident was caused by an excessive pressure of steam. Nor is it so alleged in the complaint. If we rely on the doctrine of probabilities we might as reasonably infer that the explosion was caused by the use of wet towels upon the radiator, or by reason of the radiator having been changed or weakened by its use by the lessee, as that it was caused by an excessive pressure of steam. The evidence is not such as to raise a presumption which shows that the defendants were guilty of negligence."

From the evidence in the record the cause of the Pista crop loss is left to conjecture, and it may as reasonably be attributed to a condition to which no liability attaches as to one to which it does. Therefore under the doctrine of possibilities, it is just as reasonable to infer that the damage was caused by the weather as by the dust; in fact, in the light of the uniform crop shortage and Mr. Lewis' testimony, it is much more reasonable to infer that the injury was caused by the weather than by the dust. This is merely

another statement of the burden of proof rule, and appellant maintains that not only have the appellees failed to meet this rule because they produced no competent witnesses or competent testimony, but in addition, since the injury was the result of two causes, and since the precise cause under the testimony is left to conjecture, appellees have failed to prove their case.

DISCUSSION OF QUESTION 5.

It is further the position of appellant that not only was the testimony of Twining, Pista and Anderson pure conjecture as to the cause of the crop shortage, but that in addition thereto the trial court, when it attributed 50% of the short crop to dust and 40% to the weather, arbitrarily fixed this division by indulging in conjecture unsupported by any evidence whatsoever.

Lewis refused to venture even an opinion that the dust caused any injury. Twining stated the crop would have been seven, eight or nine times what it was, if it had not been for the dust; in other words, that the Pistas would have had a crop of somewhere between 184 tons and 236 tons if it had not been for the dust. Pista estimated that if it had not been for the dust he would have had a crop of 270 to 290 tons. Twining's and Pista's testimony is the sole testimony on this issue. Yet the court reached the conclusion that the appellees would have had a crop of 159.69 tons if it had not been for the dust. It reached this conclusion by arbitrarily determining that Pista's crop would have equaled the largest crop in the county, yet there

is not one word of testimony which in any way supports such a conclusion. In other words, without a scintilla of evidence to support its conclusion, the trial court, in order to render a judgment, picked upon an arbitrary figure which is without any support whatsoever in the evidence. In *Slater v. Pan American Oil Company,* 212 Cal. 648, a number of oil companies dumped their refuse in a ravine. There was a storm and the rain water falling upon the hills flowed down through the ravine carrying oil, salt and other hydrocarbonate substances upon the respondents' property. About thirty oil wells drained into this ravine, of which the defendant company owned and operated two. The California Court pointed out (page 652) that there was no evidence as to the quantity which the defendant's wells contributed to the total volume. The court recognized the doctrine—that in case of negligence it may be difficult for a jury to determine just how much damage the defendant is liable for, and they have the right to use their best judgment and make their result, if not an absolutely accurate one, an approximation to accuracy, but the court said:

> "Assuming that the total amount of oil, salt and hydrocarbon substances deposited upon the plaintiff's land had been by actual measurement 100 barrels, that the defendant made some contribution thereto, and that the total injury done was $10,000. Could it be said that a court, without any knowledge whatsoever as to the contribution by the defendant, and upon the statement alone that there was some contribution, could apportion the damages as between the several wrongdoers? We think not.
>
> * * * * * * *

> Like all other cases for the recovery of damages in actions upon torts, a jury must be trusted to arrive at a fair estimate of the damages after a full consideration of all the evidence which may be introduced upon the subject. *However, competent evidence must be produced of all facts necessary to a recovery, upon which the jury can base a reasonably reliable conclusion; nothing can be left to mere conjecture.*" (Italics ours.)

Applying the foregoing rule, appellant contends that there has been no competent evidence produced upon which the trial court could reach a reasonably reliable conclusion, or which would in any way support the division of 50% to the dust and 40% to the weather. The evidence produced left everything to conjecture of the court, and the court indulged in such conjecture.

CONCLUSION.

It is submitted that the judgment was arrived at by piling the conjecture of the court upon the conjecture of the witnesses, and furthermore, that the objections to the hypothetical questions should have been sustained, and that therefore the judgment should be reversed.

Dated, San Francisco,
November 5, 1945.

Respectfully submitted,
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